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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 458

NEWTEX STEAMSHIP CORPORATION AND SEA-TRAIN LINES, INCORPORATED,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTER-STATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT BY APPELLEES, HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, THE CITY OF GALVESTON, THE BOARD OF COMMISSIONERS OF THE GALVESTON WHARVES, AND INTERVENING SHIPPERS, IN SUPPORT OF MOTION TO AFFIRM.

HAROLD B. FINN,
JOHN C. WHITE
Counsel for Appellees.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73-60

NEWTEX STEAMSHIP CORPORATION AND SEA-TRAIN LINES, INCORPORATED,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

STATEMENT BY APPELLEES, HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, THE CITY OF GALVESTON, THE BOARD OF COMMISSIONERS OF THE GALVESTON WHARVES, AND INTERVENING SHIPPERS, IN SUPPORT OF MOTION TO AFFIRM.

Come now Harris County Houston Ship Channel Navigation District, the City of Galveston, the Board of Commissioners of the Galveston Wharves, the Atlantis Sales Corporation, Frankfort Distilleries, Incorporated, Magnolia Petroleum Company and Magnolia Pipe Line Company, Phelps Dodge Corporation, Converted Rice, Inc., the Sherwin-Williams Co., Congoleum-Nairn, Inc., Lone Star Bag and Bagging Co., and Sears, Roebuck & Company, and file this memorandum in support of Motion to Affirm filed by the United States of America and the Interstate Commerce Commission. These appellees are the ports and

shippers which were granted leave to intervene as defendants in support of the order of the Commission giving Pan-Atlantic Steamship Corporation authority to extend its service to the ports of Houston and Galveston.

The Commission's Findings Supported by Substantial Evidence Establish the Public Need for the Proposed Additional Service and the Availability of Traffic to Sustain Regular Dependable Service.

The inadequacy and even the non-existence of the existing service and the need for additional service is shown by the following findings of the Commission:

> "Galveston, the oldest port on the Gulf, west of New Orleans, has no Atlantic-Gulf Coastwise service." 285 I. C. C. 36.
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> "Galveston has extensive port and terminal facilities great quantities of cargo move through that port in foreign and exempt domestic transportation, and its facilities are well adapted efficiently and economically to handle coastwise general cargo. It is now without berth service in the coastwise trade." 285 I. C. C. 50.
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> "Seatrain's service is prompt, reliable and efficient, but because of the conditions under which it operates, there are many shippers who cannot use its excellent service." 285 I. C. C. 37.
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> "Applicant's contentions with respect to the availability of traffic within the affected area and the public need for additional break-bulk water service are supported by the Boston Port Authority, Chamber of Commerce of Philadelphia, Rochester Chamber of Commerce, Shippers' Conference of Greater New York, Associated Industries of New York State, Inc., Houston Port and Traffic Bureau, Inc., Houston Chamber of Commerce, Galveston Cotton Exchange and Board of Trade, Galveston Chamber of Commerce, Board of Trustees of the Galveston Wharves, Fort Worth Chamber of Commerce, Fort Worth Grain & Cotton Ex-

change, Southwestern Peanut Sellers Association, Texas Cotton Seed Crushers Association, Texas Industrial Traffic League, and other shipper groups and individual shippers." 285 I. C. C. 42.

"Shippers witnesses testifying in support of the application represent some 35 concerns. * * * For various reasons, discussed below, they find the existing coastwise service inadequate. * * * They complain, on the other hand, of various shortcomings encountered in the services of both Seatrain and Newtex." 285 I. C. C. 44-45.

"Seatrain serves no Atlantic coast port except New York." 285 I. C. C. 45.

"We agree, however, with their view that fortnightly sailings south-bound from Boston and weekly from Philadelphia and Baltimore constitute rather scant service, and during the 1949 steel strike this schedule was restricted even more severely. The hampering effect of such limited service has been aggravated, moreover, by the repeated failures of Newtex vessels to sail on schedule and by the numerous outright cancellations of sailings where the available tonnage was considered insufficient to warrant dispatch of the vessel." 285 I. C. C. 46.

"Disregarding these and certain other similarly vulnerable criticisms of existing services, there remains substantial evidence that protestants' services do not fully meet the needs of shippers and that extension of applicant's operations as proposed would improve the situation." 285 I. C. C. 48.

"Its (Newtex) actual sailings have not conformed to the advertised sailing dates, many were canceled, and because of its primary reliance on steel tonnage, sailings were severely curtained in the last quarter of 1949 because of the steel strike." 285 I. C. C. 48.

"Notwithstanding the advantages provided by Seatrain's service, it too fails in some respects to meet the needs of the shippers here concerned. Shippers of low-grade traffic or of commodities not susceptible to heavy loading are discommoded by a tendency toward

'selectivity,' evinced at least occasionally by this carrier, and it offers no accommodations for shippers of less-than-carload lots. We are constrained, also, to agree that shippers at or adjacent to ports other than New York are entitled to service through the ports to which they are logically tributary, if such service is economically feasible." 285 I. C. C. 48-9.

That the existing traffic potential is high and that additional traffic can be attracted by regular, dependable and reasonably frequent sailings, which the additional service will provide, is established by the following findings of the Commission:

"While the prewar tonnage cannot be regarded as a true measure of the present traffic potential, we cannot escape the conclusion that the potential has not declined in the proportion that the existing coastwise service bears to that in operation prior to the war, and consequently that the volume at present moving in this trade is not to be regarded as the maximum available for coastwise transportation." 285 I. C. C. 49.

"We share the view of applicant and a number of its supporting shippers that a break-bulk line providing regular, dependable, and reasonable frequent sailings will engender confidence and reliance upon coastwise service and attract additional traffic. Where sailings are relatively infrequent, and especially where they are not operated in substantial comformity with advertised sailing dates, an increase in the frequency of service reasonably may be expected to increase the volume of traffic in greater measure than the proportionate increase in frequency of service. Applicant is of the view that a vigorous solicitation program will aid materially in building up a substantial traffic volume, and the increasing patronage of its existing service lends support to this view." 285 I. C. C. 49-50.

That substantial evidence before the Commission clearly sustained its findings is shown by its report, and the appel-

ant's position can only be interpreted to be that its findings were not in accord with the weight of the evidence. The Court properly held that in its review it was confined to the question of "whether there is substantial evidence to support the basic findings." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 315, (1946). It found that substantial evidence recited upon the very face of the report of the Commission.

Appellants are asking the Court to assume the function of guardian of the public interest entrusted by Congress to the discretion of the Commission. *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236 (1945).

In effect, appellants are asking this Court to deny any coastwise service whatever to the Port of Galveston, which has millions invested in port facilities and whose whole economy is dependent upon its port operations.

They are asking this Court to find, contrary to the judgment of the Commission, that Houston must be content with two sailings northbound per month and one each week southbound from New York, Philadelphia and Baltimore, compared to 9 coastwise sailings each week before the last war, when potential traffic was much less. Even this scant service, justifiably so-called by the Commission, is aggravated by failures to sail on schedule and outright cancellations.

Contrary to the law and to the findings of the Commission, they ask this Court to find that the ports of Houston and Galveston, with their tremendous industrial development and population increase, must be content with Seatrain Service from Edgewater, New Jersey, to Texas City, a competitive port. Excellent for much traffic, Seatrain Service is inadequate for reasons clearly stated in the report. Only New York is served on the Atlantic Coast and only Texas City in Texas; no less-than-carload traffic is handled;

space has been inadequate and a permit system is used with light loading and low grade commodities discriminated against.

Pan-Atlantic, when the authorization of the Commission is permitted to become effective, will provide one additional sailing each week between Houston and Galveston and Boston, New York, Philadephia and Baltimore. Its judgment is that the service is needed and can be remunerative, and the Commission so found.

Pan-Atlantic will, for the first time since the war, provide a limited coastwise passenger service with space for ten to twelve passengers, a service which is in constant request. Appellants can scarcely complain of this. They offer no such service.

The eight substantial shippers who have intervened in this proceeding and some forty others who testified before the Commission, believe that Pan-Atlantic's service is required in their own operations, and that its institution, making regular, dependable and more frequent sailings available, will result in a substantial increase in coastwise tonnage, to the benefit of both appellants and the communities and shippers. The Commission so found.

An almost casual reading of the report and order will show that the Commission has made all necessary ultimate and evidentiary findings required. Competent evidence supports those findings, and the Commission, not the courts, has been empowered to determine the questions the appellants present, and has determined them.

The original application to extend service to Houston and Galveston was filed April 3, 1950, and after extended hearing and consideration the case was decided by the Interstate Commerce Commission on August 9, 1951. Petition for reconsideration was denied by the Commission on December 10, 1951, and a second petition on January 24, 1952.

The judgment of the District Court was entered October 3, 1952, and the order allowing this appeal and continuing the injunction issued October 6, 1952. The Ports of Houston and Galveston, with many millions invested in port and terminal facilities, and the intervening shippers, continue to lack the service to which the Commission has found they are entitled.

The motion to affirm should be granted.

Respectfully submitted,

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